No. 96-1987

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

NIPPON PAPER INDUSTRIES CO., LTD.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF *AMICUS CURIAE* THE GOVERNMENT OF JAPAN IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

1. Whether the First Circuit erred in concluding that Section One of the Sherman Act, in violation of well established international law, should be given extraterritorial criminal application to business conduct undertaken by foreign nationals entirely outside the United States.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Government of Japan has a substantial interest in this case because of the principles of international law and sovereignty that it implicates.[1] The focus of this case is the business activities of Japanese corporations within Japan. In accordance with international law, anticompetitive activities occurring within Japanese territory and committed by Japanese corporations fall within the scope of Japanese jurisdiction and are regulated by Japanese legislation. The criminal application of United States antitrust laws to such activities is invalid under well settled international law.

The Government of Japan has long pursued friendly relations with the United States through the bilateral and multilateral framework of cooperation. At the heart of bilateral negotiations and consultations between these nations is a fundamental mutual respect for each State's sovereignty.

An essential element of a State's sovereignty is the right to regulate conduct within its territory, subject only to such limitations as it may have agreed to with other governments or as otherwise provided by international law. Conflicting national policies or practices should be resolved through bilateral or multilateral consultations between the countries involved. One State's unilateral extraterritorial application of its national laws is not the appropriate means for resolving international differences.

The Government of Japan wishes to make clear that it takes

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1. Pursuant to Rule 37(6) of this Court, this Court is advised that this brief was prepared solely by the *amicus curiae* and its counsel, Marks & Murase, L.L.P. No party to this case authored this brief in whole or in part. No persons other than the *amicus curiae* made any monetary contribution in connection with the preparation of this brief.

no position with respect to the merits of the underlying issues in this case. However, the Government of Japan considers itself obligated to set forth its views to this Court with respect to the vital international law issues implicated in this case. Specifically, this *amicus curiae* brief will respectfully argue to this Court that well established international law precludes the criminal application of the Sherman Act to the wholly extraterritorial conduct at issue in this case.

The Government of Japan has received consent to file this *amicus curiae* brief from the Petitioner and Respondent on this petition for a writ of *certiorari*.

SUMMARY OF ARGUMENT

This instant petition for *certiorari* presents a case of first impression before this Court with respect to an issue with far-reaching international implications: Does Section One of the Sherman Act permit criminal actions against foreign nationals for acts that occur solely outside the United States? The District Court correctly determined that the Sherman Act does not so apply and dismissed the indictments at issue. However, the First Circuit reversed, reaching a statutory interpretation of Section One impermissibly inconsistent with international law. Specifically, the First Circuit failed to give the requisite weight to the international law implications of applying the criminal portion of the Act to wholly extraterritorial conduct.

It is the opinion of the Government of Japan that if the First Circuit's decision is allowed to stand, Section One of the Sherman Act will be applied in the criminal context in a manner inconsistent with well established international law. This will have profound implications for the sovereignty of Japan and for the customary relations between nations. Because of the international significance of this case, the Government of Japan

respectfully requests that this Court grant the pending petition for certiorari, and upon hearing this case, reverse the First Circuit decision as contrary to the intent of the Sherman Act as informed by well settled international law.

ARGUMENT

I.

THE SUPREME COURT SHOULD GRANT THE PETITION FOR A WRIT OF CERTIORARI TO DECIDE THE QUESTION OF FIRST IMPRESSION OF WHETHER THERE CAN BE CRIMINAL PROSECUTION UNDER SECTION ONE OF THE SHERMAN ACT FOR WHOLLY EXTRATERRITORIAL CONDUCT.

This case presents an important question hitherto unanswered by this Court: Can the Sherman Act be applied in the criminal context to wholly extraterritorial conduct notwithstanding well settled international law that severely restricts such application of criminal statutes? The First Circuit incorrectly held that a criminal prosecution may be predicated upon Section One of the Sherman Act for wholly extraterritorial conduct. In so holding, the First Circuit gave insufficient consideration to the application of international law to the proper reach of the Sherman Act. When international law is taken into account, as it must be, it is plain that the Sherman Act should not be interpreted to permit criminal prosecution based on wholly extraterritorial conduct.

A. It Is Well Settled That Acts Of Congress Such As The Sherman Act Should Be Interpreted So As To Conform To International Law.

It is a well established principle of statutory construction

that there is a presumption against interpreting a statute in a manner that would cause it to violate international law. "It has been a maxim of statutory construction since the decision in *Murray v. The Charming Betsy*, 2 Cranch 64, 118, 2 L. Ed. 208 (1804), that 'an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains.' " *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *see also McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-21 (1963); *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814-15 (1993) (Scalia J., dissenting). It will be demonstrated below that a criminal application of Section One of the Sherman Act to the wholly extraterritorial conduct at issue in this case would violate international law. Accordingly, the Sherman Act should not be interpreted or applied to permit the reach of its criminal proscriptions to wholly extraterritorial conduct.

B. The First Circuit's Expansive Interpretation Of The Sherman Act Applying It Criminally To Wholly Extraterritorial Conduct Is Invalid Under International Law.

1. A Nation's Jurisdiction Within Its Borders Is Fundamental To Well Settled International Law.

It is a bedrock principle of international law that a sovereign nation is entitled to exercise jurisdiction, *prima facie* exclusive, over events and persons living within its territory (the "territorial principle"). This is particularly true in the context of criminal law, where the "territorial principle" is everywhere regarded as of primary importance and of fundamental character. *See* Ian Brownlie, *Principles of Public International Law*, 287, 300-03 (4th ed. 1990).

The "territorial principle" has long been recognized by courts and legal scholars. Thus, in the landmark case of *American*

Banana Co. v. United Fruit Co., 213 U.S. 347 (1909), Justice Holmes' opinion for the Court stated: "For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent." 213 U.S. at 356 (citations omitted); *see also The S.S. Lotus*, P.C.I.J., Ser. A. No. 10 (1927) ("[T]he first and foremost restriction imposed by international law upon a State is that . . . it may not exercise its power in any form in the territory of another State."). It logically follows from the primacy of every State's authority on its own soil that no State can have authority within the borders of another. *See, e.g., United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) ("Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens. . . . ") (citation omitted).

It is clear that international law limits the authority of a State to assert jurisdiction over matters within the sovereign jurisdiction of another. A commentator well summed up this principle:

> The sovereignty and equality of states represent the basic constitutional doctrine of the law of nations, which governs a community consisting primarily of states having a uniform legal personality. *** The principal corollaries of the sovereignty and equality of states are: (1) a jurisdiction, prima facie exclusive, over a territory and the permanent population living there; (2) a duty of non-intervention in the area of exclusive jurisdiction of other states. . . .

I. Brownlie, *Principles of Public International Law*, 287.

Under international law, if a crime did not occur within the territory of the sovereign, there must be a sufficiently effective link between the crime and the State to overcome the presumption that criminal law is, *prima facie*, exclusively territorial in its reach. *See id.* at 306; *see also,* 1 *Oppenheim's International Law* 468 (9th ed. 1992) ("in the absence of any direct and substantial connection between the state exercising jurisdiction and the matter in relation to which jurisdiction is exercised, the exercise of jurisdiction would be a violation of international law.") (footnote omitted). As demonstrated below, no such effective link exists in this case.

2. International Law Restricts The Extraterritorial Reach Of Criminal Statutes Where "Substantial Foreign Elements" Are Present.

International law plainly restricts the extraterritorial reach of criminal laws where there is no direct and substantial link between a State claiming jurisdiction and the matter over which jurisdiction is to be exercised — in other words, where the elements of the transaction at issue are substantially foreign.

The Restatement (Third) of the Foreign Relations Law of the United States (1986) (the "Restatement"), summarizes international law as derived from customary international law and from international agreements and is treated by United States courts as setting forth the central principles of international law. *See, e.g., Hartford Fire*, 509 U.S. at 799 (citing Restatement); *Hartford Fire*, 509 U.S. at 818 (Scalia, J., dissenting) ("I shall rely on the Restatement (Third) [of Foreign Relations Law] for the relevant principles of international law.").

For the instant case, the Restatement provides specific guidance with respect to the extraterritorial application of the criminal United States antitrust laws:

> The principles governing [jurisdiction to prescribe] apply to criminal as well as civil litigation. However, in the case of regulatory statutes that may give rise to both civil and criminal liability, such as United States antitrust and securities laws, *the presence of substantial foreign elements will ordinarily weigh against application of criminal law.* In such cases, legislative intent to subject conduct outside the state's territory to its criminal law should be found only on the basis of express statement or clear implication.

Restatement § 403, cmt. f (emphasis added).

Reporters' Note 8 to Section 403 of the Restatement further sets forth the special concerns associated with the imposition of criminal sanctions on foreign conduct: "[T]he exercise of criminal (as distinguished from civil) jurisdiction in relation to acts committed in another state may be perceived as particularly intrusive." That Note further observes that "It is generally accepted by enforcement agencies of the United States government that criminal jurisdiction over activity with substantial foreign elements should be exercised more sparingly than civil jurisdiction over the same activity, and only upon strong justification." Importantly, the Note recognizes that this limit on the extraterritorial reach of criminal law applies with particular force with respect to economic crimes: "No case is known of criminal prosecution in the United States for an economic offense (not involving fraud) carried out by an alien wholly outside the United States." *Id.*[2]

2. Though Section 415 of the Restatement addresses the extraterritorial reach of antitrust laws, it, unlike the comments and notes to Section 403, does not address the distinction between the reach of criminal law as distinct from civil law. Furthermore, the concepts of "substantial effect" and "principal

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International law will presume a sufficient connection between a State and a crime committed abroad only in the case of crimes with serious political and security significance, such as espionage and treason and internationally condemned crimes. *See* 1 *Oppenheim's International Law,* 469-71. In such cases, the State in whose territory the act occurs is not likely to object to regulation by the State concerned. *See* Restatement § 403, rep. n.8.[3]

In short, the extraterritorial reach of a nation's criminal laws with respect to the acts of foreign nationals on another country's soil, except in the most serious cases, is highly disfavored by well established international law.

3. Properly Interpreted Consistent With International Law, Section One Of The Sherman Act Should Not Be Applied On An Extraterritorial Basis In The Criminal Context To Conduct Wholly Outside The United States.

As set forth in Section A, it is well settled that United States

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purpose" set forth in Section 415 are too vague and subjective to be properly applied in the case of extraterritorial criminal jurisdiction. Accordingly, Section 403 should be principally relied upon in properly determining this distinction.

3. Under the so-called "universal principle," a nation has authority under international law to define and prescribe punishment for aliens within foreign territory for certain limited offenses recognized by the community of nations to be of universal concern, such as piracy, slave trade, hijacking, war crimes, etc. Restatement § 404. Similarly, the "protective principle" recognizes the right of a State to punish a limited class of offenses committed outside its territory by foreign nationals that are directly against the security of the state. *Id.* § 402, cmt. f. The antitrust laws do not concern the type of offenses these principles contemplate.

laws not otherwise certain on their face are to be interpreted in conformity with international law. In addition to this fundamental rule of statutory construction, there also exists a strong presumption in United States law against the extraterritorial application of federal statutes, absent a clear expression by Congress to the contrary. *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991). Further consistent with international law, this presumption carries even more weight when applied to criminal statutes. *United States v. Bowman*, 260 U.S. 94, 97-98 (1922); *see also,* 1 *Oppenheim's International Law* 82.

The language and legislative history of Section One of the Sherman Act are unclear as to the Section's extraterritorial reach.[4] Therefore, a proper interpretation of the Act recognizes in the first instance that it is to be interpreted and applied so as to conform to, or to at least not offend, international law. *See Weinberger*, 456 U.S. at 32. Here, international law is clear: the presence of "substantial foreign elements" weighs heavily against the extraterritorial application of criminal antitrust law. As set forth more fully in the District Court opinion, 944 F. Supp. 55, the alleged conspiracy at issue involved solely Japanese nationals and corporations, and the contacts between these aliens in furtherance of the alleged conspiracy to fix prices occurred wholly outside of the United States, namely in Japan. The "foreign elements" could not be more "substantial."

Further, given the primacy of Japan's jurisdiction over alleged criminal acts occurring within its borders, criminal application of the United States antitrust laws to conduct by Japanese nationals committed wholly within Japan would be "particularly intrusive" to Japan's jurisdiction. *See* Restatement § 403 n. 8.

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4. Earl W. Kintner, 1 *Federal Antitrust Law* §§ 7.1 - 7.2 (Anderson 1980).

The fatal flaw in the First Circuit's decision was its failure to recognize that an extraterritorial application of the criminal aspect of the Sherman Act to the facts of this case was invalid under international law. The First Circuit also erred by giving short shrift to the strong presumption against the extraterritorial application of criminal laws. The First Circuit erroneously treated the civil and criminal aspects of the Sherman Act as if they had identical international law implications and were subject to an identical statutory interpretation.

As shown, the extraterritorial application of criminal laws gives rise to considerably greater sovereignty concerns than does such application of civil laws. *See* Restatement § 403, cmt f. and n. 8. Aside from crimes universally viewed as heinous, the extraterritorial application of criminal laws runs an especially significant risk of infringing upon the sovereign rights of a foreign nation.

First, a criminal prosecution, as distinct from a civil action, entails the right and ability to incarcerate an individual.[5] This authority is a grave one indeed, since it means the ability to remove the most precious of rights — freedom. The authority to undertake this most solemn duty is traditionally reserved to the State in which the offending acts took place or to the State of which the offender is a national. Here, neither is the case. Second, the extraterritorial application of criminal laws runs the considerable risk that foreign parties may not be able to foresee or predict that their conduct could expose them to criminal punishment abroad. *Cf. BMW of North America Inc. v. Gore*, 116 S. Ct. 1589, 1598 & n.22 (1996) (reaffirming principle that a person must receive fair notice of the conduct that will subject him to punishment).

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5. Indeed, for these reasons, international law provides clear guidelines for the extraterritorial enforcement of a State's criminal laws. *See* Restatement §§ 431-433.

Indeed, as one commentator has noted:

> [B]oth civil and criminal proceedings have a potential for encroaching upon the territorial sovereignty of the foreign state concerned, since both may involve the exercise of state authority; but this is more evident, and creates more serious problems, in relation to criminal cases where the involvement of the public authority of the prosecuting state is readily perceived as leading to the exercise of such authority by one state within the territory of another.

1 *Oppenheim's International Law* 466-67 (footnote omitted).

Given the unique and important concerns intrinsic to criminal law, it is not surprising that international law treats differently the extraterritorial application of criminal as distinct from civil laws. *See* Restatement, § 403, cmt. f and rep. n. 8; *see also* 1 *Oppenheim's International Law,* 466-68. Because the extraterritorial reach of the Sherman Act must be determined in accordance with international law, it follows that the proper statutory construction of the extraterritorial reach of the Sherman Act differs as between its civil and criminal contexts. *Cf. United States v. United States Gypsum Co.*, 438 U.S. 422 (1978) (holding that the standard dispensing with a *mens rea* requirement in civil antitrust cases did not apply in criminal prosecutions under the Sherman Act). Indeed, as Judge Lynch noted in his concurring opinion in the First Circuit, "New content is sometimes ascribed to statutory terms depending upon context." 109 F.3d 1, 10; *see also Robinson v. Shell Oil Co.*, 117 S. Ct. 843, 847 (1997) (same).

Thus, while an extraterritorial application of the Sherman

Act in the civil context might, as a bare majority of this Court held in *Hartford Fire*, 509 U.S. 764, be proper, this is entirely distinct, as a matter of international law and statutory construction, from a determination that such an extraterritorial reach would be appropriate in the criminal context. Indeed, by casting aside this distinction, the First Circuit disregarded centuries of case law and other authority reaffirming a State's particular authority over criminal acts within its borders. By ignoring the important role that this fundamental tenet of international law has in this case, it impermissibly failed to apply the Sherman Act to conform with this most fundamental principle of international law.

Because the extraterritorial application of criminal law — with certain exceptions not at issue here — is highly disfavored in international law, a proper interpretation of Section One of the Sherman Act should preclude its extraterritorial reach in the criminal context where, as here, the conduct at issue was committed by foreign nationals and occurred wholly outside the United States.

C. The "Effects Doctrine" Does Not Justify Or Permit The Extraterritorial Application Of Criminal Prosecution Under The Sherman Act.

Lacking any other connection between the United States and the matter over which it seeks to assert jurisdiction, the United States Government asserts jurisdiction in this case based on the "effects doctrine." Yet, no court in the United States to our knowledge has ever based criminal jurisdiction of the Sherman Act with respect to a foreign national for acts occurring abroad on the sole basis that the acts had an effect in the United States. It is important to note that *Hartford Fire*, which may have found the "effects doctrine" sufficient in the civil context, was not a criminal case, cited no criminal cases, and did not

address at all the unique concerns that arise where a criminal statute is sought to be applied extraterritorially.

Importantly, for the reasons set forth in Section B, the "territorial principle" has special primacy with respect to a State's criminal punishment of its citizens for acts taking place within its borders. *See, e.g.*, R. LaFave & W. Scott, *Criminal Law* § 16 at p. 111 (1983) ("for the most part federal criminal law rests only upon the territorial basis of jurisdiction."). It is respectfully submitted that a State is not justified in imposing criminal penalties upon a foreign national for acts occurring within another nation's territory solely on the basis of the resulting "effects" upon the State. Rather, for valid jurisdiction to exist under international law, at least a part of the constituent elements of the crime must be committed within the State's borders or there must exist a case for the proper application of the "universal" or "protective" principles.

It should be noted that the "effects doctrine" has not been universally accepted as consistent with international law. As one international law commentator explained:

> The justification for such assertions of jurisdiction on the basis of an alleged "effects" principle of jurisdiction has not been generally accepted, and the matter is still one of controversy. The exercise of jurisdiction because of the effects of an act within the state may amount to no more than an "objective" application of the territorial principle of jurisdiction, but where the effects relied on are not a constituent part of the offense in question but are mere consequences or repercussions of the act done, the legitimate bounds of the territorial

> principle of jurisdiction are overstepped, particularly if the effects are only incidental and insubstantial: in this lies the danger of impropriety in resort to the effects principle as a basis for jurisdiction and the doubtful consistency of that principle with international law.

1 *Oppenheim's International Law,* 474-75 (footnotes omitted). It also should be noted that the "effects doctrine" has to our knowledge never been accepted as a legitimate basis for an extraterritorial reach of criminal punishments for economic offenses, aside from fraud. *See* Restatement, § 403, n. 8. Indeed, it cannot be accepted as such consistent with international law.

Because of the concerns unique to the application of criminal laws, they should not be given extraterritorial reach except, as permitted by the "universal" and "protective" principles, with respect to the most heinous of crimes which all civilized nations recognize rightly may be prohibited outside a State's borders. The mere "effects" upon a State resulting from alleged economic crimes are not sufficient under international law to justify an extraterritorial reach of one particular State's criminal laws.

D. Respect For Other Sovereign States Should Preclude An Extraterritorial Reach Of The Criminal Sherman Act In This Case.

The fact that under *Hartford Fire* the United States and its citizens may attempt to reach out and seek civil legal relief against a foreign national for acts occurring abroad militates against, not in favor of, the extension of this doctrine to the criminal sphere. Considerations of international "comity," or the respect sovereign nations afford each other by limiting the reach

of their laws, should limit the further extraterritorial reach of United States antitrust law. *See Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597, 608-15 (9th Cir. 1976).

Hartford Fire purportedly affords the United States and its nationals a vehicle to pursue civil legal redress in connection with alleged antitrust violations emanating from abroad and from foreign nationals. In the opinion of the Government of Japan it would be unnecessary and an affront to the sovereignty of foreign nations for the United States also to take upon itself the authority to punish foreign nationals for alleged anticompetitive acts abroad in the criminal context as well. *See* 1 *Oppenheim's International Law*, 476 ("There comes a point . . . at which the application of a state's criminal law to the activities of foreigners in a foreign state involves an infringement of the territorial sovereignty and jurisdiction of the foreign state to which it may properly object.").

While the Government of Japan reserves the right to differ on the appropriateness of the "effects doctrine" in the civil context, it should be noted that the interests of the United States apparently can be adequately served by the extraterritorial reach that it has asserted in the antitrust civil context. *See Hartford Fire*, 509 U.S. 764. A further reach across international boundaries — this time with the authority to criminally punish — would violate international norms and would be contrary to the international restraint urged by this Court's sound reasoning from the beginnings of its jurisprudence.

II.

INTERNATIONAL COOPERATION IN A GLOBAL ECONOMY REQUIRES AN INCREASED RESPECT FOR TERRITORIAL SOVEREIGNTY.

One result of our globalized economy is that civilized nations are faced with similar problems in the field of competition policy. They are therefore obliged to adopt very similar legal norms which prohibit certain anti-competitive conduct. Accordingly, conduct that is prohibited in one State will more often than not be prohibited in another. The foregoing diminishes the need for the extraterritorial application of jurisdiction over crimes committed abroad by foreign nationals.

Furthermore, if a State is permitted to claim extraterritorial jurisdiction over a crime committed entirely abroad, the potential world-wide reach of that nation's criminal laws would be boundless. It is the opinion of the Government of Japan that that state of affairs would create disorder in the legal system governing the international relations among nations. The impact at this time of an extraterritorial extension of a criminal antitrust law would be particularly great because of the growing interdependence among citizens and corporations across the globe.

To avoid a profound disruption of international relations, it is the opinion of the Government of Japan that the "territorial principle" should be closely adhered to as the primary basis for punishing criminal economic conduct. In circumstances where the foregoing may not be sufficient, States should enter into appropriate bilateral or multilateral arrangements for mutual cooperation. For instance, if a State learns of criminal conduct committed by foreign nationals abroad that have certain effects within that State, that State should request the foreign State to

take appropriate action, rather than unilaterally applying its own domestic law abroad.

In short, affording primacy to the "territorial principle" with respect to the reach of criminal statutes would promote security and certainty in international life and will lessen friction among States. This, combined with international cooperation, will ensure the effective international enforcement of laws.

CONCLUSION

For all of the foregoing reasons, the petition for writ of *certiorari* should be granted.

Respectfully submitted,

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